Avenue, Harlingen, Texas 78550. *Id.* at 1. The OSC alleged that Registrant's registration should be revoked because Registrant is ''currently without authority to handle controlled substances in the State of Texas, the state in which [he is] registered with DEA.'' *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

The Agency makes the following findings of fact based on the uncontroverted evidence submitted by the Government in its RFAA dated January 3, 2023.[1]

Findings of Fact

On July 20, 2021, the Texas Physician Assistant Board issued an Order of Temporary Suspension that suspended Registrant's Texas physician assistant license. RFAAX 3, Attachment B, at 1, 5–6. According to Texas online records, of which the Agency takes official notice, Registrant's license is still suspended.[2] Texas Medical Board License Verification, *https://profile.tmb.state.tx.us* (last visited date of signature of this Order). Accordingly, the Agency finds that Registrant is not currently licensed to engage in the practice of medicine in Texas, the state in which he is registered with the DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA) ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27616, 27617 (1978).[3]

According to Texas statute, ''[d]ispense'' means ''the delivery of a controlled substance in the course of professional practice or research, by a practitioner or person acting under the lawful order of a practitioner, to an ultimate user or research subject. The term includes the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for delivery.'' Tex. Health & Safety Code Ann. section 481.002(12) (2022). Further, a ''practitioner'' means a ''a physician . . . or other person licensed, registered, or otherwise permitted to distribute, dispense, analyze, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state.'' *Id.* at section 481.002(39)(A).

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine in Texas. As discussed above, a person must be a licensed practitioner to dispense a controlled substance in Texas. Thus, because Registrant lacks authority to practice medicine in Texas and, therefore, is not authorized to handle controlled substances in Texas, Registrant is not eligible to maintain a DEA registration. Accordingly, the Agency will order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. MM3333109 issued to Fernando Mendez, P.A. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending applications of Fernando Mendez, P.A., to renew or modify this registration, as well as any other pending application of Fernando Mendez, P.A., for additional registration in Texas. This Order is effective March 6, 2023.

Signing Authority

This document of the Drug Enforcement Administration was signed on January 25, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Heather Achbach,

Federal Register Liaison Officer, Drug Enforcement Administration.

[FR Doc. 2023–02122 Filed 2–1–23; 8:45 am]

BILLING CODE 4410–09–P

[1] Based on the Declarations from a DEA Diversion Investigator and a DEA Special Agent, the Agency finds that the Government's service of the OSC on Registrant was adequate. RFAAX 2, at 1–2; RFAAX 3, at 2–3. Further, based on the Government's assertions in its RFAA, the Agency finds that more than thirty days have passed since Registrant was served with the OSC and Registrant has neither requested a hearing nor submitted a written statement or corrective action plan and therefore has waived any such rights. RFAA, at 3; RFAAX 3, at 3; *see also* 21 CFR 1301.43 and 21 U.S.C. 824(c)(2).

[2] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute the Agency's finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to the DEA Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.gov.*

[3] This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR 71371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51104, 51105 (1993); *Bobby Watts, M.D.,* 53 FR 11919, 11920 (1988); *Frederick Marsh Blanton,* 43 FR at 27617.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 22–22]

Ester Mark, M.D.; Decision and Order

On March 12, 2022, the Drug Enforcement Administration (hereinafter, DEA or Government) issued an Order to Show Cause (hereinafter, OSC) to Ester Mark, M.D. (hereinafter, Respondent) of California, alleging that Respondent materially falsified both her April 2019 initial application for a DEA Certificate of Registration and her February 2022 renewal application for that same

registration. OSC, at 3–4 (citing 21 U.S.C. 824(a)(1)).[1]

A hearing was held before DEA Administrative Law Judge Paul E. Soeffing (hereinafter, the ALJ), who on October 3, 2022, issued his Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision (hereinafter, RD). The RD recommended revocation of Respondent's registration and denial of Respondent's application for renewal of her registration. RD, at 18. Respondent did not file exceptions to the RD.[2] Having reviewed the entire record, the Agency adopts and hereby incorporates by reference the entirety of the ALJ's rulings, credibility findings,[3] findings of fact, conclusions of law, sanctions analysis, and recommended sanction found in the RD. I. Findings of Fact

The following facts are undisputed. On or about June 12, 2015, the Medical Board of California filed an accusation against Respondent seeking a decision to revoke or suspend Respondent's California medical license. RD, at 3. Further, on or about December 9, 2015, a felony complaint was filed against Respondent in the Superior Court of California, County of Orange, alleging five counts of unlawfully possessing for sale a controlled substance and five counts of unlawfully prescribing a controlled substance without a legitimate medical purpose. *Id.* Both the accusation filed against Respondent's state medical license and the criminal case against Respondent remained pending at all relevant times. *Id.* at 3, 5 (citing Tr. 35–36; Government Exhibit (hereinafter, GX) 4–8, 11). On or about July 7, 2017, DEA issued an OSC, proposing to revoke Respondent's DEA Certificate of Registration No. BM5370123 because Respondent's continued registration was inconsistent with the public interest. RD, at 2–3. On March 31, 2021, DEA issued a Final Order revoking that registration. *Id.* at 3.

On April 2, 2019, Respondent applied for a new DEA Certificate of Registration.[4] Tr. 16, 40–42, 47; GX 2, at 1. The first question on the application asked whether Respondent had ''ever been convicted of a crime in connection with controlled substance(s) under state or federal law . . . or [is] any such action pending?'' and Respondent answered ''no,'' even though she had a pending criminal action against her. RD, at 10–11; Tr. 40–41; GX 2, at 1; GX 6–8. The second question on the application asked whether Respondent had ''ever surrendered (for cause) or had a federal controlled substance registration revoked, suspended, restricted or denied, or is any such action pending?'' and Respondent answered ''no,'' even though she had a pending OSC against her for her previous DEA registration. RD, at 10–11; Tr. 41–42, 44–45; GX 2, at 1; GX 9–10. Finally, the third question on the application asked whether Respondent had ''ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?'' and Respondent answered, ''no,'' even though she had a pending disciplinary action with the Medical Board of California. RD, at 9–12; Tr. 47; GX 2, at 1; GX 4–5, 11.

Here, the Agency finds that Respondent's answers to the liability questions on her initial application for DEA registration were clearly false; nonetheless, on January 31, 2022, Respondent applied for renewal of her registration and once again falsely answered ''no'' to the first and third liability questions on the application.[5] RD, at 12; Tr. 16–17, 20–21, 28–29; GX 3, at 1; GX 4–8, 11. The Agency also finds from clear, unequivocal, convincing, and unrebutted evidence that in each of the instances in which Respondent provided an incorrect answer to a liability question, she either knew or should have known that her answers were incorrect due to her awareness of the status of the various actions against her.[6]

Regarding her incorrect answers to the liability questions on both her initial and renewal applications, Respondent testified that she had thought that she was responding truthfully but had been confused. Tr. 80; RD, at 6–7.[7] Conversely, the DI testified that she contacted Respondent in November 2021 regarding the incorrect answers on her initial application, but Respondent did not ask for clarification regarding any confusion that she had had with the liability questions and went on to again answer ''no'' to the first and third liability questions on her renewal application even after the DI had spoken with her regarding ''liability questions as a whole'' and the pending criminal and disciplinary charges. Tr. at 99–100; *see also* GX 3, at 1. In regards to her conversation with the DI, Respondent testified that the DI ''wasn't really fair,'' ''was never specific,'' and ''just told [her] that [she] [had] lied on the application.'' Tr. at 90, 105–106. Here, the Agency finds, as the ALJ found, that

[1] The Government sought to revoke the registration in question, No. FM8267052 at the registered address of 9950 Research Drive #A, Irvine, California 92618. *Id.* at 1.

[2] On October 26, 2022, Respondent filed a Motion to Extend Deadline to File Exceptions. On October 27, 2022, the ALJ issued an Order Denying Respondent's Untimely Motion to Extend Deadline to File Exceptions.

[3] The Agency adopts the ALJ's summary of each of the witnesses' testimonies as well as the ALJ's assessment of each of the witnesses' credibility. *See* RD, at 3–7. The Agency agrees with the ALJ that the Diversion Investigator's testimony, which was focused on the non-controversial introduction of documentary evidence and the Diversion Investigator's contact with the case, was credible in that it was consistent, genuine, and without indication of any animosity towards Respondent. *Id.* at 5. Further, the Agency agrees with the ALJ that Respondent's testimony was at times irrelevant, non-responsive, defensive, and dismissive and was not fully credible. *Id.* at 7.

[4] Both initial and renewal applications for a DEA registration include four liability questions, and if a registrant answers ''yes'' to any of the four questions, then the application is flagged for review before it can be approved. RD, at 4–5; Tr. 17. In contrast, if a registrant answers ''no'' to all four liability questions, then the application is automatically approved. RD, at 4; Tr. 50. Because Respondent answered ''no'' to all four liability questions, her application was automatically approved and she received a new DEA registration. RD, at 4; Tr. 48, 50.

[5] Regarding the first liability question, the Diversion Investigator (hereinafter, the DI) testified that Respondent's answer of ''no'' was untruthful because at the time of her renewal application, Respondent was still ''pending state charges.'' Tr. at 21–20, 35–36; GX 3, at 1; GX 6–8. Regarding the third liability question, the DI testified that Respondent's answer of ''no'' was untruthful because at the time of her renewal application, Respondent still had a pending disciplinary action with the Medical Board of California. Tr. 28–29, 35–36; GX 4–5, 11; RD, at 5–6, 12.

[6] Regarding the first liability question on both her initial and renewal applications, Respondent testified that she had been aware of the pending criminal action against her at the time of both her initial and renewal applications. Tr. 67–68, 74–75, 88; *see also* GX 6–8. As such, Respondent knew or should have known at the time of her initial and renewal applications that she had a pending criminal action against her and thus knew or should have known that her answers of ''no'' to the first liability question on both applications were false. *See* GX 2, at 1; GX 3, at 1. Regarding the second liability question on Respondent's initial application, Respondent testified that she went through the administrative hearing process and filed exceptions and so had been aware of the pending OSC against her for her previous DEA registration at the time of her initial application. Tr. 74; *see also* GX 9–10. As such, Respondent knew or should have known at the time of her initial application that she had a pending OSC against her for her previous DEA registration and thus knew or should have known that her answer of ''no'' to the second liability question was false. *See* GX 2, at 1. Finally, regarding the third liability question on both her initial and renewal applications, Respondent testified that she had been aware of the Medical Board of California's pending accusation against her at the time of both her initial and renewal applications. Tr. 70–71, 74–75, 89; *see also* GX 4–5; GX 11. As such, Respondent knew or should have known at the time of her initial and renewal applications that she had a pending disciplinary action with the Medical Board of California and thus knew or should have known that her answers of ''no'' to the third liability question on both applications were false. *See* GX 2, at 1; GX 3, at 1.

[7] *See also* Tr. 66–75, 79, 84–85, 87; GX 2, at 1; GX 3, at 1.

''the Respondent's arguments that her false statements were made because she was 'confused' are not credible.'' RD, at 14.[8]

II. Discussion

The Administrator is authorized to revoke a registration if the registrant has materially falsified an application for registration. 21 U.S.C. 824(a)(1); *see also* RD, at 8. Further, Agency decisions have repeatedly held that false responses to the liability questions on an application for registration are material. *Kevin J. Dobi, APRN,* 87 FR 38184, 38184 (2022) (collecting cases); *see also* RD, at 9, 12–15. Regarding Respondent's claims that she had thought that she was responding truthfully to the liability questions on both her initial and renewal applications, *see supra* I, Agency precedent has found that the Government must only show that a respondent knew or *should have known* that her response to a liability question was false. *Narciso A. Reyes, M.D.,* 83 FR 61678, 61680 (2018) (citing *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23852 (2007)); *see also* RD, at 12–15. As such, a respondent's claim that she misunderstood a liability question, or otherwise inadvertently provided a false answer to a liability question, is not a defense when the Government has made such a showing. *Reyes,* 83 FR 61680 (citing *Alvin Darby, M.D.,* 75 FR 26993, 26999 (2010)). Indeed, the respondent bears the responsibility to carefully read the liability questions and to answer them honestly; ''[a]llegedly misunderstanding or misinterpreting liability questions does not relieve the [respondent] of this responsibility.'' *Zelideh I. Cordova-Velazco, M.D.,* 83 FR 62902, 62906 (2018) (internal citations omitted).

Having read and analyzed the record, the Agency finds from clear, unequivocal, convincing, and unrebutted evidence that Respondent's initial application for a new registration, submitted in April 2019, contains three material falsifications and that Respondent's renewal application for her registration, submitted in January 2022, contains two material falsifications. *See supra* I. Moreover, even if it is true that Respondent's incorrect answers to the liability questions were caused by confusion or were otherwise inadvertent, it is inconsequential. As such, the Agency finds that the Government has established a *prima facie* case for revocation of Respondent's registration pursuant to 21 U.S.C. 824(a)(1).

III. Sanction

Here, the Government has established grounds to revoke Respondent's registration; thus, the burden shifts to Respondent to show why she can be entrusted with the responsibility of registration. *Garret Howard Smith, M.D.,* 83 FR 18882, 18910 (2018). When a registrant has committed acts inconsistent with the public interest, she must both accept responsibility and demonstrate that she has undertaken corrective measures. *Holiday CVS, L.L.C., dba CVS Pharmacy Nos 219 and 5195,* 77 FR 62316, 62339 (2012) (internal quotations omitted). Here, as the ALJ found, Respondent ''failed to unequivocally accept responsibility at any point during her testimony.'' RD, at 15–16. Respondent instead offered various excuses and reasoning as to why she incorrectly answered the liability questions and continually emphasized that she had been confused, blaming the wording of the questions, the DI, and the Agency for her false answers that she knew or should have known were false. *See supra* I; RD, at 16–17.

When a registrant fails to make the threshold showing of acceptance of responsibility, the Agency need not address the registrant's remedial measures. *Ajay S. Ahuja, M.D.,* 84 FR 5479, 5498 n.33 (2019) (citing *Jones Total Health Care Pharmacy, L.L.C. & SND Health Care, L.L.C.,* 81 FR 79188, 79202–03 (2016)); *Daniel A. Glick, D.D.S.,* 80 FR 74800, 74801, 74810 (2015). Even so, in the current matter, Respondent has made no showing of any remedial measures other than changing her response to the second liability question from ''no'' to ''yes'' on her renewal application once she became aware of the revocation of her previous DEA registration. *See supra* I. Because Respondent still continued to incorrectly answer ''no'' to the first and third liability questions on her renewal application and because Respondent has not offered evidence of any additional measures that she has taken to ensure that she will correctly answer any liability questions in the future, Respondent has not sufficiently demonstrated that she is ready to be entrusted with the responsibility of registration.

In addition to acceptance of responsibility, the Agency considers both specific and general deterrence when determining an appropriate sanction. *Daniel A. Glick, D.D.S.,* 80 FR 74810. In this case, the Agency believes that revocation of Respondent's registration would deter Respondent and the general registrant community from failing to meet their obligation to provide accurate and truthful responses on an application for DEA registration. *Kareem Hubbard, M.D.,* 87 FR 21156, 21164 (2022); RD, at 17. Moreover, Respondent's misconduct was also egregious. *See Garrett Howard Smith, M.D.,* 83 FR 18910 (collecting cases). As the ALJ noted, ''[t]he Respondent's actions of submitting not one, but two applications that include multiple material falsifications goes 'to the heart of the CSA.' '' RD, at 17 (quoting *Crosby Pharmacy and Wellness,* 87 FR 21212, 21215 (2022)).

Having reviewed the record in its entirety, the Agency finds that Respondent cannot be entrusted with the responsibility of DEA registration. Accordingly, the Agency will order that Respondent's registration be revoked and that Respondent's application for renewal of her registration be denied.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. FM8267052 issued to Ester Mark, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending applications of Ester Mark, M.D., to renew or modify this registration, as well as any other pending application of Ester Mark, M.D., for additional registration in California. This Order is effective March 6, 2023.

Signing Authority

This document of the Drug Enforcement Administration was signed on January 25, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Heather Achbach,

Federal Register Liaison Officer, Drug Enforcement Administration.

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[8] Further, even if it was true that Respondent had been confused, as the ALJ noted, ''the Respondent had the opportunity to resolve any confusion she had when she spoke with the DI regarding her [renewal] application, but she did not do so.'' *Id.; see also* Tr. 92, 99–100.